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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 JOB CREATORS NETWORK,

4 Plaintiff,

5 v.

21 Civ. 04818 (VEC)

6 OFFICE OF THE COMMISSIONER OF
7 BASEBALL, et al.,

Conference

8 Defendants.
9 -----x

New York, N.Y.
June 10, 2021
3:00 p.m.

10
11 Before:

12 HON. VALERIE E. CAPRONI,

13 District Judge

14 APPEARANCES

15 HOWARD KLEINHEDDER ESQUIRE
16 Attorney for Plaintiff
17 BY: HOWARD KLEINHEDDER

18 SULLIVAN & CROMWELL, LLP
Attorneys for Defendant
19 BY: JOHN L. HARDIMAN
BENJAMIN WALKER

20 WINSTON & STRAWN LLP.
Attorneys for Defendant
21 BY: JEFFREY L. KESSLER
22 DAVID GREENSPAN
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24
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(In open court)

THE DEPUTY CLERK: In the matter of Job Creators Network v. Major League Baseball, et al, 21 Civ. 4818. Counsel, please state your appearance for the record.

MR. KLEINHENDLER: Good afternoon, your Honor. Howard Kleinhendler for the plaintiff. And with me is Mr. Alfredo Ortiz, the CEO of Job Creators Network. And with him is one of his counsel, Abigail Frye.

THE COURT: Good afternoon, Mr. Kleinhendler, Mr. Ortiz, and Ms. Frye.

MR. HARDIMAN: Your Honor, John Hardiman from Sullivan and Cromwell representing Major League Baseball and Commissioner Manfred. And this is Ben Walker from my office working with me on the matter.

THE COURT: Good afternoon, Mr. Hardiman.

MR. KESSLER: Good afternoon, your Honor. Jeffrey Kessler from Winston & Strawn on behalf of the Major League Baseball Players Association. My partner, David Greenspan, to to my right. And my client, Bruce Meyer, who is the chief labor counsel for the MLBPA is behind me.

THE COURT: Good afternoon, Mr. Kessler and Mr. Greenspan, and Mr. Meyer.

MR. KESSLER: I'm also appearing for Tony Clark as well, your Honor.

THE COURT: Thank you. Please be seated.

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1 Mr. Kleinhendler, this is your motion.

2 MR. KLEINHENDLER: Thank you, your Honor. The facts
3 here, your Honor, are not in dispute. In 2019, Major League
4 Baseball announced that in 2021, the All Star Game would be
5 played in Truist Park, the Atlanta Braves' home field in Cobb
6 County, Georgia. That announcement, your Honor, was not
7 conditional. Mr. Manfred didn't say, in 2019, we will play the
8 All Star Game in 2021 if you don't cast any laws that we're
9 upset with, if you don't do anything terrible. Between
10 July 2019 and March 26th, 2021, the All Star Game was going to
11 be played at Truist Park. But then the State of Georgia,
12 through its duly elected legislature, signed the election
13 integrity act, they signed a voting law. Six days later, on
14 April 2nd, Major League Baseball announced that they were
15 withdrawing the game from Atlanta. And they weren't shy about
16 it. They said, we are withdrawing this game because we don't
17 like your election law.

18 Four days later, they announced the game is going to
19 Denver, Colorado. The game is currently scheduled to be played
20 on July 13th.

21 For 21 months, your Honor, businesses in Georgia and
22 the Atlanta area were planning, preparing, budgeting, spending
23 money, getting ready for the All Star Game. And we have in our
24 reply papers an affidavit from Mr. Christopher Florence, who
25 had a women's softball league. For two years, between 2019 and

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1 2021, he was preparing for his world conference series, where
2 he was expecting 80 teams to arrive to the Atlanta area. These
3 are women or girls between 10 and 18 who participate in a
4 series. The opening ceremonies of this series was going to be
5 played in Truist Park, because the All Star Game, your Honor,
6 is a three-day affair; there's a minor league game, then
7 there's a sluggers fest, and then there's the game. And the
8 opening ceremonies were going to be during one of those events
9 at Truist Park. As soon as Major League Baseball announced
10 they're pulling the game, half the teams said, we're not
11 coming. If there is no All Star Game, we're not coming to
12 Atlanta. This man is a member of JCN, he articulates a
13 70 percent drop in revenue, a concrete injury.

14 THE COURT: But it's a concrete injury that's already
15 occurred.

16 MR. KLEINHENDLER: Correct. But the injury is
17 ongoing, because if the game comes back, he will be able to
18 remedy the situation.

19 THE COURT: That doesn't make it an ongoing injury.

20 MR. KLEINHENDLER: Well, the ongoing injury is still
21 the injury to the other businesses who can't get back on their
22 feet. They lost the revenue. They lost all of their --

23 THE COURT: Just to be clear, the only affidavit I
24 have -- and there are no factual allegations in the
25 complaint -- but assuming that you can amend your complaint via

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1 an affidavit submitted in your reply papers, which is not the
2 rule, all these other businesses, there's nothing in here from
3 other businesses about injuries.

4 MR. KLEINHENDLER: Your Honor, we are asserting the
5 claim as an organization.

6 THE COURT: Understood. So let's talk about JCN.

7 MR. KLEINHENDLER: Let's talk about JCN, they are
8 representing 3,600 businesses, and they have asserted that
9 these injuries will be ongoing.

10 THE COURT: I am aware of that.

11 MR. KLEINHENDLER: Okay.

12 THE COURT: So let's talk about JCN. What exactly is
13 the mission of JCN?

14 MR. KLEINHENDLER: The mission of JCN is to educate,
15 lobby, assist small businesses to create jobs, Job Creators
16 Network. They are there to serve as a voice for the small
17 business people. Your Honor, an organization like JCN protects
18 and insulates small businesses that suffer economic harm but
19 are afraid to become plaintiffs. That was true of the NAACP
20 and other organizations that had standing when small black
21 businesses were afraid to sue. So organizations such as JCN
22 are the voice of small businesses.

23 THE COURT: There's no question that an organization
24 can have organizational standing. What I'm trying to figure
25 out is which bucket of organizational standing you purport to

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1 the bring this lawsuit in.

2 MR. KLEINHENDLER: Your Honor, I argue in two buckets.
3 One is the regular membership organization bucket, and in
4 the --

5 THE COURT: Meaning you are suing on behalf of
6 yourself?

7 MR. KLEINHENDLER: No. Separately, I'm suing on
8 behalf of my members. I also have my own ongoing injury.

9 THE COURT: Let's talk about JCN. Let's deal with
10 these one at a time. How was JCN injured?

11 MR. KLEINHENDLER: It had to divert resources, your
12 Honor.

13 THE COURT: Again, let's go back to the mission. So
14 what is the mission -- according to your website and sort of
15 what you just said, Mr. Ortiz's affidavit describes the mission
16 as educating employees of Main Street America in order to
17 protect those that depend on the success of small businesses.
18 So I assume by "Main Street America," you're talking about
19 small businesses?

20 MR. KLEINHENDLER: Correct.

21 THE COURT: So that is part of the mission. And the
22 second part of the mission is amplifying members' stories to
23 educate policymakers about the consequences of bad policy.
24 That's how Mr. Ortiz describes the mission --

25 MR. KLEINHENDLER: Correct.

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1 THE COURT: -- in Paragraph 7 of his affidavit. So
2 you agree with that?

3 MR. KLEINHENDLER: Yes.

4 THE COURT: So how has that mission been at all
5 impinged? You say you're diverting resources, but part of your
6 mission seems to be to amplify the purported grievances of
7 small businesses. So isn't this like right in your wheelhouse?

8 MR. KLEINHENDLER: Your Honor, it's in our wheelhouse,
9 to the extent that we want to help businesses make more money.
10 But it's not in our wheelhouse to pick people that have been
11 trampled by constitutional violations off the ground and try to
12 make sure they have food to feed their families. Even if that
13 is part of our mission, we have to devote extraordinary amounts
14 of resources to this small area of our national scope because
15 we now can't help people, let's say, in Phoenix or Texas
16 because we have to take our resources and devote it now to
17 Atlanta.

18 THE COURT: Are you giving direct grants to small
19 businesses that have been harmed by Major League Baseball
20 moving the All Star Game?

21 MR. KLEINHENDLER: We don't give direct grants.

22 THE COURT: So what you do is take out ads and create
23 billboards; right?

24 MR. KLEINHENDLER: We take out ads, we create
25 billboards.

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1 THE COURT: But that's your mission, that's what you
2 do?

3 MR. KLEINHENDLER: Your Honor, yes, that's what we do.
4 But when we have a catastrophe, we have to stop helping
5 everybody and we have to now focus on only a very, very small
6 portion, which diverts resources locally, which ordinarily
7 would be spread out all over.

8 THE COURT: So essentially, you're saying, this is the
9 mission. It's just you think you're harmed because the
10 particular policy that you have decided is bad and bad enough
11 to get your attention primarily affects only businesses in the
12 Atlanta area?

13 MR. KLEINHENDLER: Correct.

14 THE COURT: And therefore, you're injured because
15 you're focusing on Atlanta small businesses, as opposed to
16 small businesses across the country?

17 MR. KLEINHENDLER: Correct, correct.

18 And let me just get --

19 THE COURT: But you have taken on local issues before?

20 MR. KLEINHENDLER: Correct.

21 THE COURT: So it's still sort of generally within the
22 wheelhouse of JCN to take on local issues that have an adverse
23 impact on small businesses?

24 MR. KLEINHENDLER: 100 percent. That's why we fit
25 right into the Hunt factors. Because what we're doing is

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1 totally consistent with our mandate, with what our mission is.
2 That's the first Hunt factor, your Honor. The second Hunt
3 factor is we're very close to our members. And we articulated
4 that in the reply memorandum. They come to our board meetings.
5 They have total access to us through a host of communications.
6 That allows us to step forward -- putting aside our direct
7 injury -- and assert their injuries.

8 Now, I just want to get back to one question you said;
9 the ongoing injury. There is an ongoing injury to the softball
10 team. They're still bleeding money. They're still losing
11 money, because they can't get teams to their tournament. So
12 it's not, oh, your losses have been stopped. These losses are
13 ongoing. If the game comes back, the losses go away. So there
14 is an ongoing loss with Mr. Florence, which is right before
15 you. And he's just one example.

16 THE COURT: How is it going? I thought you told me
17 everybody canceled.

18 MR. HARDIMAN: Half the teams canceled.

19 THE COURT: And half the teams are coming?

20 MR. KLEINHENDLER: Half the teams are coming.

21 THE COURT: So mazel tov. He's got at conference.

22 MR. KLEINHENDLER: But his injury is ongoing because
23 number one --

24 THE COURT: No, his injury has happened. He's not
25 going to make as much money as he thought he was going to make;

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1 right?

2 MR. KLEINHENDLER: And he might still lose more money.

3 THE COURT: You haven't alleged that. How?

4 MR. KLEINHENDLER: Because more teams may drop out,
5 because once they see we're going from 80 to 40, it can drop to
6 30 and 20.

7 THE COURT: And there could be a hurricane and no one
8 would come.

9 MR. KLEINHENDLER: Well, the point here is there was a
10 constitutional violation.

11 THE COURT: We'll get to the constitutional violation
12 in just a second.

13 So beyond the single affidavit from Mr. Florence, what
14 other factual information have you given me to show that
15 members of JCN have been harmed?

16 MR. KLEINHENDLER: I've given you Mr. Ortiz's
17 affidavit.

18 THE COURT: But Mr. Ortiz doesn't have anything
19 specific either, I don't believe.

20 MR. KLEINHENDLER: He talks about the various types of
21 members that have been -- in his moving after -- he talks about
22 various different businesses that were harmed.

23 THE COURT: Like who?

24 MR. KLEINHENDLER: He talks about a limo driver. He
25 talks about --

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1 THE COURT: He doesn't say he's a JCN member.

2 MR. KLEINHENDLER: Other than, at this point,
3 Mr. Florence, we haven't identified any specific members. But
4 we have identified the types of members that were hurt.

5 THE COURT: But you haven't closed that loop. That
6 is, you have identified the type of businesses in Atlanta that
7 might be harmed by the movement of the All Star Game. But you
8 haven't connected that those businesses or even those types of
9 businesses, specifically, are members of JCN. I mean, I think
10 you just want me to speculate that you have members beyond
11 Mr. Florence who actually suffered any kind of an adverse
12 impact of the move of the game.

13 MR. KLEINHENDLER: Your Honor, Mr. Ortiz, in his
14 affidavit described the type of business. Correct, we haven't
15 pro haec verba identified all the businesses. But guess what,
16 it doesn't matter. One is enough. One injury is enough for
17 standing. We're talking about standing now. We're talking
18 about standing for injunctive relief. One injury is enough.
19 And I think I would submit to you that Mr. Florence's injury is
20 detailed, he's a member, it's articulate, and it's clearly
21 100 percent related to pulling the All Star Game. So we
22 have --

23 THE COURT: Why don't we talk about what the actual
24 claim is.

25 MR. KLEINHENDLER: Okay. So your Honor, the claims

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1 fall into two buckets; constitutional claims and state law
2 claims. The constitutional claims further get divided into two
3 parts; claims that are dependent on whether Major League
4 Baseball is a state actor and a claim that is not dependent on
5 whether Major League Baseball is a state actor.

6 So let's start with the threshold issue; is Major
7 League Baseball a state actor? Yes.

8 Why? So first, let's talk about the All Star Game.
9 This is not Yankees versus Mets, subway series, where there are
10 only two teams involved. This is the All Star Game. The All
11 Star Game is specifically discussed in the MLB charter. All
12 money from the All Star Game goes to one central fund for the
13 MLB. All teams must send players to the All Star Game. So all
14 the teams, in effect, contribute to the All Star Game. We have
15 case law from this court, to begin with, that says New York
16 Yankees are a state actor.

17 THE COURT: You're talking about the *Ludtke* case?

18 MR. KLEINHENDLER: Yes.

19 THE COURT: That is not what that case holds. That
20 case is entirely distinguishable. So Yankee Stadium is owned
21 by the City. Under the lease agreement, the Yankees were
22 obligated to comply with local law. The City wasn't requiring
23 them to comply local law when they allowed women to be excluded
24 from the locker room. That's not this case. Similarly, the
25 other case you cited, the *Lewis* case, the Coors Field case is

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1 also entirely distinguishable.

2 MR. KLEINHENDLER: Your Honor, we're talking about
3 teams that if you ask the question, is there an entwinement
4 between the local governments and the team, which is the test,
5 there is a local --

6 THE COURT: It's more involved than that, but okay.

7 MR. KLEINHENDLER: The local involvement manifests
8 itself in the following ways: Extraordinary amounts of public
9 funding for the stadiums. We attached in my papers, your
10 Honor, a compendium showing how many teams, what kind of money
11 they get. I counted 14 teams that get 70 percent of their
12 stadium public funding, five of them are a hundred percent.
13 That public funding comes with strings attached, as articulated
14 in the articles in our compendium. They have to charge tax for
15 ticket sales that go to the municipality. They --

16 THE COURT: Do you have any cases that have taken your
17 theory, which is looking at the *Ludtke* case or looking at the
18 Lewis case, where it's a very specific thing that the team does
19 that's connected to a city owned stadium, any case that has
20 broadened that so that anything that a baseball team does,
21 regardless of where it's doing it, constitutes state action?

22 MR. KLEINHENDLER: There's no case that says anything
23 a baseball team does. That's why I started this argument by
24 talking about the All Star Game. It's a unique event.

25 THE COURT: But it doesn't specifically involve

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1 government action.

2 MR. KLEINHENDLER: It involves Major League Baseball.
3 And if Major League Baseball's teams are all, for the most
4 part, funded by billions and billions of dollars of state and
5 local money -- and many of those teams have obligations to
6 state governments, such as the state provides security, the
7 state levies taxes on ticket sales, on -- all of that.

8 And why do municipalities take on these burdens of
9 having to issue municipal bonds that they have to pay off that
10 they have to levy on or spread out among their taxpayers? Why?
11 Because baseball brings a certain benefit to the city.

12 THE COURT: That's what they think. They think that
13 they bring in more than they cost. But that still doesn't make
14 the beneficiary who uses the stadium a state actor. Even if
15 you combine them all and look at it as Major League Baseball.

16 MR. KLEINHENDLER: If a woman can sue to forcibly
17 enter the locker room during the World Series -- that case
18 didn't just sue the Yankees, it sued the commissioner --
19 because it was a commissioner of baseball decision, it wasn't a
20 Yankee decision, it was a commissioner of baseball decision
21 that no women were going to come into the locker room. And
22 what the court said is, well, you baseball, you commissioner of
23 baseball, you are bound by what obligations Yankee Stadium has.
24 Now, when you say, well, Yankee Stadium is simply owned by New
25 York, okay, several other stadiums are owned by states. And

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1 therefore, these teams become infused with the obligations of
2 state actors. And the question is -- what I want to argue to
3 you, your Honor, is we only need one state actor to cause the
4 entire MLB at the head to be considered a state actor, because
5 the MLB is an unassociated corporation. It does not exist. It
6 exists as part of its members -- are what it is. And because
7 this is a collaborative event, the All Star Game, all you need
8 is one member to be a state actor and MLB is stuck with that
9 state actor responsibility. That's argument one, okay.

10 Argument two is, no, I don't have a specific case, but
11 I've got a five-part test from the Second Circuit that was
12 broke down in *Ludtke* that informs courts what is considered a
13 state actor. So let's just look at that.

14 One, the private entity's degree of dependence on the
15 government. Major League Baseball is out of business without
16 these government subsidies. Over 70 percent of their stadiums
17 receive over 50 percent public funding.

18 THE COURT: They could make their own stadiums.
19 That's why there is public dispute over whether stadiums should
20 be funded with bond dollars is because Major League Baseball
21 has more money than -- I'm sure there's an expression there --
22 they could build their own stadiums.

23 MR. KLEINHENDLER: Your Honor, but the fact is --

24 THE COURT: I know you all don't like that, but
25 it's --

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1 MR. KLEINHENDLER: The fact is they don't.

2 THE COURT: But you said they would be out of
3 business. They would not be out of business. They would just
4 have to reach into their pockets. Some of those players may
5 not make as much money -- they're not going to like that over
6 there -- but they could do it.

7 MR. KLEINHENDLER: Right now, when we're speaking,
8 their dependence on governmental aid is substantial.

9 THE COURT: Have you ever heard the expression sucking
10 at the public tit?

11 MR. KLEINHENDLER: Yes.

12 THE COURT: That's what they're doing. It doesn't
13 mean they're dependent on it. It means they got the benefit of
14 it.

15 MR. KLEINHENDLER: Two, the extent of intrusiveness of
16 government regulation. All these ballparks are subject to
17 public security. Some of the ballparks -- as we said, in
18 Colorado, we cited the statutory -- there are statutes that say
19 that the ballpark area is part of the state, in Colorado, for
20 example.

21 THE COURT: Right.

22 MR. KLEINHENDLER: Whether or not aid is given to all
23 similar institutions. No. We pointed out to you that
24 football, basketball, hockey gets far less aid than baseball.
25 And guess what, none of them have the antitrust exemption that

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1 baseball has.

2 Whether or not the institution performs a public
3 function. I would argue it does. This is baseball. It
4 provides an outlet for youth. It provides an emolument to the
5 cities that have these stadiums. That's why the stadiums can
6 say, listen, I want a \$50 million makeover for my stadium or I
7 pick up and I leave. Why do they have such leverage over these
8 cities? Because these cities need these stadiums to feed the
9 local businesses, to bring in businesses, to bring in the type
10 of residents that they want to have in their city. So I would
11 argue to you, your Honor, that there is a tremendous public
12 function served by baseball, right. They call themselves the
13 national pastime.

14 And finally, the legitimacy of the organizations
15 claimed to be regarded as a private character. Your Honor,
16 they don't act as a private character when they have the
17 ability to force municipalities to basically fork over tens of
18 millions of dollars or hundreds of millions of dollars to build
19 these stadiums. And they have this federal antitrust exemption
20 that no one else has.

21 So my argument to you, your Honor, is when you look at
22 the five-factor test, you can conclude that baseball is a
23 public entity.

24 THE COURT: Look, let's assume it is.

25 MR. KLEINHENDLER: Okay.

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1 THE COURT: What's the constitutional violation?

2 MR. KLEINHENDLER: We have two. Violation number one
3 is 42 USC 1985, they call it the KKK act. And that's where two
4 people conspire to either deprive or hinder people's rights.
5 The deprivation clause here is simple. Your Honor, if Major
6 League Baseball had a theater --

7 THE COURT: If Major League Baseball had what?

8 MR. KLEINHENDLER: A theater, down the street. And
9 they said, guess what, you're from Atlanta, you can't come into
10 my theater, I don't like your voting laws. You're from
11 Colorado, I love your voting laws, you can come into my
12 theater. That's a violation of equal protection. That's a
13 violation of privilege of their immunities.

14 THE COURT: What's the best case you have that says
15 that would be a violation of equal protection?

16 MR. KLEINHENDLER: Okay, best case. The NOW -- well,
17 that was the hindrance clauses National Organization of Women,
18 where people were blocking women from going into abortion
19 clinics and the court said that was a violation for equal
20 protection under 1985(3). And it didn't even require a state
21 actor.

22 THE COURT: But that was women, the group whose equal
23 protection rights were being deprived was women.

24 MR. KLEINHENDLER: Here you are depriving --

25 THE COURT: What is the group?

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1 MR. KLEINHENDLER: People from Georgia.

2 THE COURT: Is there any case that says, residents of
3 a state are a group for equal protection purposes, any case?

4 MR. KLEINHENDLER: There are cases that talk about
5 political affiliation, yes.

6 THE COURT: That's political affiliation. You're
7 talking about all residents of the State of Georgia.

8 MR. KLEINHENDLER: All residents of the State of
9 Georgia have effectively been denied entrance to the movie
10 theater.

11 THE COURT: No, they haven't. They are welcome to fly
12 to Colorado to go to the game.

13 MR. KLEINHENDLER: No, but they want the game in
14 Atlanta so they can make a living.

15 THE COURT: Anybody who is dependent on one baseball
16 game over three days in the middle of the summer to make a
17 living, that's a problem. But that's not your theory; right?

18 MR. KLEINHENDLER: Your Honor --

19 THE COURT: For the equal protection theory to work,
20 you need a group that's being discriminated against as compared
21 to another group that's otherwise similarly situated.

22 MR. KLEINHENDLER: Correct.

23 THE COURT: What's the group?

24 MR. KLEINHENDLER: The group is Georgia citizens are
25 being discriminated against versus Colorado citizens. Those

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1 are your two groups. And that clearly fits into the privileges
2 and immunities clause. Because if Major League Baseball is a
3 state actor, they're treating citizens of one state differently
4 than they're treating citizens of another state. They're
5 saying, we are not going to provide our All Star Game to you in
6 Georgia. Why? Because we don't like your laws. But we will
7 give it to Colorado.

8 THE COURT: They're not providing it to 48 other
9 states also.

10 MR. KLEINHENDLER: They're not providing it to 48
11 other states because they can only play it one year at a time.

12 THE COURT: Correct.

13 MR. KLEINHENDLER: But they promised it to us in
14 Georgia.

15 THE COURT: This isn't a contract case. You are not
16 the State of Georgia, you are not the Cobb County stadium.

17 MR. KLEINHENDLER: This has nothing to do with
18 contracts. This has to do with the small businesses in Atlanta
19 who spent money waiting for the game and lost all that money.
20 Why? Because their government enacted a law. That's a
21 constitutional violation when you're a state actor. You can't
22 say, I'm going to treat you, Georgia, different than I'm going
23 to treat Colorado. You can't do that, if they're a state
24 actor, unless you have a valid reason. And saying, I don't
25 like your voting law is not a valid reason, because the voting

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1 law is articulated in the Amicus, the voting law is a state
2 function. And what they were complaining about is voter ID,
3 your Honor. Voter ID has been held by the Supreme Court to be
4 a valid means of protecting voter integrity. So they don't
5 have a valid reason for doing what they did. And they
6 announced their reason.

7 You can't simply say, I'm going to hurt people in
8 Georgia by basically intimidating, taking away a financial
9 incentive, hurting them by making them lose money -- which is
10 what they did -- because I don't like your voting law. And
11 guess what, I'm going to give it to Colorado. Now, Major
12 League Baseball could say, your Honnor, we're not having an All
13 Star Game this year. They don't have to be in the All Star
14 Game business.

15 THE COURT: Well, wouldn't that harm the small
16 businesses in Georgia in exactly the same way that moving the
17 game to Colorado did?

18 MR. KLEINHENDLER: Exactly right. But your Honor,
19 that's the point. If they said, you know something, we're not
20 having an All Star Game, we decided we don't want to have this
21 event, then we would not have a constitutional violation. We
22 would still have our promissory estoppel violation, but we
23 wouldn't have a constitutional violation. The fact that they
24 said, we're taking it from you, Georgia, and we're giving it to
25 Colorado, that's the constitutional violation.

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1 THE COURT: Well, let me ask you something. Let's
2 suppose that baseball was going to expand again.

3 Do you all still expand periodically?

4 MR. HARDIMAN: Yes, every now and then.

5 THE COURT: I know more about baseball than I do about
6 soccer, but every once in a while you expand. So are you
7 saying that Major League Baseball could not say, we have two
8 expansion teams, we're not going to give an expansion team to
9 state X, because state X has some type of state law that we
10 think is just not consistent with our values as a team, as an
11 industry, we'll go to this state because it doesn't have that
12 law?

13 MR. KLEINHENDLER: If they have a valid reason. Your
14 Honor, if they have a valid reason.

15 THE COURT: So then you're just quarreling with their
16 rationale, that they thought the law was inconsistent with
17 their values?

18 MR. KLEINHENDLER: Correct. That is not a legitimate
19 reason.

20 THE COURT: Why isn't it?

21 MR. KLEINHENDLER: Why is it not a legitimate reason?

22 THE COURT: You're not challenging their good-faith
23 basis. As a good-faith matter, Major League Baseball says this
24 change in the law is not consistent with the values that we
25 want to respect or honor or whatever -- I don't have the exact

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1 language, but whatever it was -- you're not contesting that
2 that wasn't in good faith.

3 MR. KLEINHENDLER: I am. Because in the complaint, I
4 say it was based on a bunch of inaccuracies.

5 THE COURT: You're just saying they got it wrong?

6 MR. KLEINHENDLER: They got it wrong.

7 THE COURT: They misunderstood the law, but you're not
8 challenging their good faith; right?

9 MR. KLEINHENDLER: I am challenging their good faith.

10 THE COURT: What's the basis of your challenge to
11 their good faith?

12 MR. KLEINHENDLER: Because they adopted a series of
13 characterizations about the law that they could have checked in
14 two seconds was not true.

15 THE COURT: But again, you're just saying they're
16 wrong. Look, people do things based on things that are wrong,
17 it happens. There was an invasion of the Capitol, based on
18 just thinking something happened that didn't happen.

19 MR. KLEINHENDLER: Okay.

20 THE COURT: So people do things based on faulty
21 information. You think Major League Baseball acted on faulty
22 information, on a faulty understanding of what the law is.
23 That's your theory of what makes it -- therefore, it was in bad
24 faith. Therefore, because they're a state actor, from a
25 privileges and immunities perspective, they can't pick one

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1 state over another. Is that your theory?

2 MR. KLEINHENDLER: Correct. They cannot pick one
3 state over the other.

4 THE COURT: Because they were wrong?

5 MR. KLEINHENDLER: It doesn't matter whether they were
6 wrong. It doesn't matter what their intention was.

7 THE COURT: Wait a minute. I'm sorry, I thought we
8 went down this rabbit hole because you acknowledged that for
9 expansion teams they could pick and choose between states.

10 MR. KLEINHENDLER: No, I did not acknowledge that.

11 THE COURT: They can't pick and choose between states?

12 MR. KLEINHENDLER: Wait a second. They can pick and
13 choose between states if they have a valid reason for picking
14 and choosing. For example --

15 THE COURT: If there was a state law that was just
16 anathema to the players of Major League Baseball, that wouldn't
17 be a valid reason?

18 MR. KLEINHENDLER: Not if it's a legal law that goes
19 to voting rights, no. No.

20 THE COURT: So your theory is only cabined to Major
21 League Baseball can't weigh in on anything that has to do with
22 voting rights?

23 MR. KLEINHENDLER: They can weigh in, but what they
24 can't do is they can't take punitive action against a state
25 that has enacted voting laws and then use that punitive action

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1 to then benefit another state. That's privileges and immunity.
2 What they could have done, what they could have done is
3 canceled the All Star Game.

4 THE COURT: Punish everybody?

5 MR. KLEINHENDLER: They can't punish everybody in a
6 single state. They can punish everybody and say, look, I just
7 don't want to do an All Star Game today. That's not a
8 constitutional violation.

9 Let me put it this way. Judge, I own a pizza shop,
10 okay -- this is the *Burton* case -- I own a coffee shop, a
11 minority walked in, I don't like that minority, I don't want to
12 serve them. That's a violation.

13 THE COURT: That's correct, because you're
14 discriminating on the basis of race.

15 MR. KLEINHENDLER: But I could simply just say, I'm
16 not going to be in the coffee shop business anymore.

17 THE COURT: Absolutely.

18 MR. KLEINHENDLER: That's the story here with
19 baseball.

20 THE COURT: No, Mr. Kleinhendler, there's a difference
21 between discriminating against a person of color because
22 they're a person of color and the decision of an organization
23 to move a game from one state to another where the impact of
24 that decision is not -- as far as I can tell, it's not even
25 your argument -- that the impact of that decision is a

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1 disparate impact on blacks, on whites, on men, on women.

2 MR. KLEINHENDLER: Your Honor, we have made that
3 argument.

4 THE COURT: What is the argument?

5 MR. KLEINHENDLER: The argument that Atlanta is over
6 51 percent black and Colorado is only 9 percent black.

7 THE COURT: So they intended to discriminate against
8 blacks? Is that your theory?

9 MR. KLEINHENDLER: I don't know what their intention
10 was. But the result was discrimination against blacks, and
11 that's in the Jones Amicus, your Honor, and that's a fact.

12 THE COURT: Again, you're suing on behalf of members
13 of JCN, so you haven't shown that there's a disproportionate
14 impact on minority members of JCN. You haven't even alleged
15 that there are any minority members of JCN.

16 MR. KLEINHENDLER: Your Honor, I haven't alleged that
17 X amount of members are minorities, but what I have alleged is
18 that my members are businesses in Atlanta. My members were
19 hurt because the game left Atlanta. And that --

20 THE COURT: That's a conclusory allegation. The only
21 factual allegation you gave me was about the softball
22 tournament.

23 MR. KLEINHENDLER: But you don't need more than one.

24 THE COURT: Just to be clear.

25 MR. KLEINHENDLER: Yes.

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1 THE COURT: This entire case is brought on a single
2 softball tournament?

3 MR. KLEINHENDLER: No.

4 THE COURT: In terms of an actual factual allegation
5 of injury?

6 MR. KLEINHENDLER: Yes, at this point, yes. And the
7 point is, your Honor, I don't need more than that. And the
8 fact is that Major League Baseball needs a valid reason not to
9 have -- for example, what if Major League Baseball says we're
10 not letting any players from Georgia, from the Braves
11 participate in the All Star Game, I would argue, your Honor,
12 that that would be a constitutional violation. Because if the
13 reason they are not letting those Georgia players play is
14 because they don't like Georgia voting laws, then they
15 basically intimidated the people of Georgia. They are treating
16 the people of Georgia differently than they're treating
17 everybody else in Major League Baseball. And you can't do that
18 if you're a public actor. You just can't. And yeah, we don't
19 really have a lot of case law on this because this is a unique
20 situation. But the principles of what I'm telling you are
21 strewn about in a lot of different Supreme Court cases that we
22 cited to you.

23 And there's another state actor issue here. And that
24 is under 1983, the second part under 1983, we have a violation
25 of the dormant commerce clause because basically -- and because

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1 basically, what's happening here is, they are telling the state
2 what type of election law you are allowed to enact, which is
3 basically like preclearance, which the Supreme Court has said
4 violates equal protection.

5 So yeah, they're a for-profit business, but if they
6 are a state actor and they are burdened with constitutional
7 requirements or constitutional duties, they must then live up
8 to the Constitution. And they cannot say, Georgia, we treat
9 you one way because we don't like your voting laws. But
10 Colorado, no problem, here's the All Star Game, we like your
11 voting laws.

12 Now with regard to 1983 and not a state actor, what
13 they're doing here that's wrong is they are intimidating the
14 Georgia legislature.

15 THE COURT: The legislature has already acted.

16 MR. KLEINHENDLER: Correct.

17 THE COURT: You think their goal is to get Georgia to
18 change the law?

19 MR. KLEINHENDLER: Of course. Why else would they do
20 it? What's the point?

21 THE COURT: Let me ask you something. You like the
22 law, right, your guys like the law?

23 MR. KLEINHENDLER: I don't think --

24 THE COURT: Your client thinks it was a good law?

25 MR. KLEINHENDLER: Yes, we think it was a good law.

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1 THE COURT: They have a First Amendment right to think
2 that; right?

3 MR. KLEINHENDLER: This has nothing to do with the
4 First Amendment.

5 THE COURT: Do they have a First Amendment right to
6 propound that they believe the new Georgia voting law is a good
7 policy choice for Georgia?

8 MR. KLEINHENDLER: If they don't hurt anybody with it,
9 then they're allowed to --

10 THE COURT: So doesn't Major League Baseball have the
11 same right?

12 MR. KLEINHENDLER: No. Not when they take away the
13 economic benefits -- which everybody estimated as \$100 million
14 everybody is waiting for -- that's a hindrance, your Honor.

15 THE COURT: But it didn't hinder.

16 MR. KLEINHENDLER: It did, they took it away.

17 THE COURT: The law passed.

18 MR. KLEINHENDLER: The law passed, but now they're
19 punishing the state for passing the law.

20 THE COURT: How does that come under hindrance?
21 Hindrance is to prevent something from happening.

22 MR. KLEINHENDLER: Right.

23 THE COURT: It happened.

24 MR. KLEINHENDLER: It happened. But by doing this,
25 they are basically intimidating the state to take steps so that

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1 they shouldn't have such a law in place and that affects the
2 right of voters in Georgia to have their voice heard in an
3 election that has integrity.

4 THE COURT: Again, you have gotten so far afield from
5 your client's interests. That's an argument that says the law
6 is good, and if they get their way, there are going to be
7 elections that are lawless in Georgia.

8 MR. KLEINHENDLER: There are going to be elections
9 that will not have as much security and integrity as the law
10 currently provides.

11 THE COURT: How is that at all relevant to this case?

12 MR. KLEINHENDLER: Because that --

13 THE COURT: Your argument is that JCN was harmed.

14 MR. KLEINHENDLER: JCN's members are harmed. The
15 people of Georgia are harmed if the election laws that they are
16 subject to do not provide and do not enable them to have one
17 vote counted properly because it's diluted by other votes by
18 people who don't show, for example, voter ID. That is a harm
19 to JCN. This case is not JCN, it's the members. The members
20 are from the Georgia.

21 THE COURT: It would only be a diluted vote if the
22 person without a voter ID was also not a qualified voter.

23 MR. KLEINHENDLER: Correct. But your Honor, I think
24 the point here is, what Major League Baseball said to the State
25 of Georgia is, we don't like your law, and we're going to

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1 punish you. How are we punishing you? We're taking a
2 \$100 million economic benefit and we're going to give it to
3 another state. Why? Because we like their law or their law
4 doesn't offend us. If you are a public actor, you can't do
5 that.

6 THE COURT: You agree that if I disagree with you or
7 at least I find that there's not a high likelihood you're going
8 to succeed on that argument, that they can do as they please,
9 if I reject your state actor argument?

10 MR. KLEINHENDLER: If you reject my state actor
11 argument and you reject the argument that, even as a nonstate
12 actor they have intimidated the state, which is then going to
13 violate its inhabitants' equal protection, because the state
14 will be now intimidated and forced to take action to change its
15 law or do other things to accommodate Major League Baseball's
16 perceived notion of what's fair in election integrity --
17 because that's the other part -- you don't have to be a state
18 actor for that.

19 THE COURT: What factual evidence have you put before
20 me that Major League Baseball moving out of Georgia is likely
21 to cause the Georgia legislature to do anything? Let alone to
22 deprive your members of their right to equal protection of the
23 law.

24 MR. KLEINHENDLER: Your Honor, this act doesn't
25 require the actual harm to happen. The threat of it is

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1 sufficient.

2 THE COURT: But they're not threatening anybody. They
3 just moved the game.

4 MR. KLEINHENDLER: But moving the game was a
5 punishment. They punished us. So if you're punished and you
6 want to get out of that situation, you have to change your
7 behavior. They punished us, right. Isn't that what they did?

8 THE COURT: I get what you're saying, but I can't say
9 that just based on the fact that they moved the game that that
10 in fact hindered or that it was their intent to hinder the
11 state legislature in passing whatever law they thought was
12 appropriate.

13 MR. KLEINHENDLER: Your Honor, why else would they
14 move the game?

15 THE COURT: Because they didn't like what they did.

16 MR. KLEINHENDLER: When you're a --

17 THE COURT: I have told you, assume they are not a
18 state actor.

19 MR. KLEINHENDLER: If they're not a state actor, what
20 they did was still intimidation. Whether the intimidation is
21 going to work at the end of the day, you're right, we don't
22 know. But the fact that the result of what they did is an
23 intimidation --

24 THE COURT: That's what I thought your theory was.

25 MR. KLEINHENDLER: That's correct.

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1 THE COURT: That the result of their action was
2 intimidation?

3 MR. KLEINHENDLER: Yes.

4 THE COURT: That says your argument is that the
5 Georgia legislature is going to react to their action by
6 changing the law. So my question is: What are the factual
7 allegations you have given me that would allow me to draw that
8 inference?

9 MR. KLEINHENDLER: Your Honor, you can assume that
10 because Georgia is interested in having a robust economy and
11 having robust business, and if an institution like Major League
12 Baseball is going to label Georgia a racist Jim Crow -- which
13 is what the president called it -- a racist Jim Crow state with
14 racist laws and its businesses are allowed to get harmed as a
15 result of this to the tune of \$100 million, I would argue to
16 you, your Honor, that's enough of a constitutional violation.
17 I don't need to prove to you that the State of Georgia is
18 actually going to react to it. We don't know. It could be
19 different governors, different people. The fact that they
20 threatened it and they did that through a punitive action
21 directed only at Georgia is in itself a violation of the
22 Constitution. That's our position.

23 THE COURT: Because it hinders the state legislature?

24 MR. KLEINHENDLER: It hinders the state's ability to
25 effectively protect its citizens through passing proper

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1 election integrity laws because they have been threatened
2 because they just did law A. So they have been threatened.
3 You can't do that. You can't threaten people with punitive
4 action. And it doesn't really matter what their intent was.

5 THE COURT: Wait a minute, you can't possibly really
6 think that. That's just not true. I mean, if a bill is being
7 considered, a business can say, if you pass that law that is so
8 contrary to our core values that we cannot bring our
9 headquarters there, we simply cannot do it; you're saying that
10 can't be done?

11 MR. KLEINHENDLER: No, that can be done. That's fine.

12 THE COURT: Then what's the difference?

13 MR. KLEINHENDLER: The difference is, we promised you
14 a game --

15 THE COURT: No, no, no.

16 MR. KLEINHENDLER: We punished you. This is not a
17 punishment. This is a decision saying, you know what, we're
18 not going to come to your state.

19 THE COURT: Let's say they have all but signed the
20 deal to relocate headquarters with thousands of employees, with
21 lots of roads that have already been built to get the
22 industrial park ready for the new manufacturing plant, and the
23 president of that company says, you pass this law, we can't
24 deal with that. It is contrary to our values, we will not
25 move. You're saying they can't do that because the state is

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1 already expecting them?

2 MR. KLEINHENDLER: No, that's different. No. That's
3 not the state is already expecting them. Your Honor, this is
4 two years, we're going to bring the game here.

5 THE COURT: It's the same thing.

6 MR. KLEINHENDLER: How is it the same thing? I'm --

7 THE COURT: There's not a contract with the State of
8 Georgia. If they had a contract with Cobb County stadium, I
9 assume they paid whatever cancellation fee they had to pay.

10 In my example, trust me, small businesses would have
11 geared up, they would be ready for it, they would have hired
12 employees because we want to be there, we want to be close by
13 so that we can be the first coffee shop.

14 MR. KLEINHENDLER: Then, your Honor, in that
15 situation, if these businesses said -- not that if you're going
16 to pass, because you're allowed to lobby -- but since you
17 passed this law, you actually engaged in the law that you
18 passed, you passed a law, we're pulling out now and we're going
19 to punish you because we don't like the law you passed, yes,
20 that would be a violation.

21 THE COURT: What more do you want to tell me?

22 MR. KLEINHENDLER: I want to tell you about the state
23 law violations. And again, it goes back to what we started at.
24 We started at the argument that when they announced the game
25 was going to Cobb County in 2019, it wasn't qualified.

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1 THE COURT: It wasn't what?

2 MR. HARDIMAN: It wasn't a qualified announcement. It
3 was not a conditional announcement. They promised people,
4 people relied on that promise, and they took steps based on
5 that promise. There's a promissory estoppel claim here.

6 THE COURT: I don't think you brought a promissory
7 estoppel claim.

8 MR. KLEINHENDLER: I did.

9 THE COURT: You brought a tortious interference with
10 contract claim and a tortious interference with business
11 relations claim.

12 MR. KLEINHENDLER: Keep going.

13 MR. KLEINHENDLER: My fifth claim for relief,
14 Paragraph 77.

15 THE COURT: All right.

16 MR. KLEINHENDLER: They promised people like
17 Mr. Florence they were going to bring the game here. He spent
18 a lot of money trying to get the game ready.

19 THE COURT: He spent a lot of money --

20 MR. KLEINHENDLER: Trying to get the championship
21 ready, just giving him as an example.

22 THE COURT: That he does every year? He sponsors that
23 game every year?

24 MR. KLEINHENDLER: He sponsors the game every year.

25 THE COURT: So it's the same expenditure he's always

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1 made?

2 MR. KLEINHENDLER: But he lost 40 teams because of
3 what Major League Baseball did by breaking their promise.

4 THE COURT: Maybe it was because those 40 teams were
5 also annoyed at the law.

6 MR. KLEINHENDLER: No. That is not what he says. He
7 said they stopped coming because there was no reason to come to
8 Atlanta.

9 THE COURT: Does he give the basis for why he thinks
10 that?

11 MR. KLEINHENDLER: They told him that. They said,
12 we're not coming to Atlanta if there's no game. Here it is,
13 paragraph 11, there was no longer a compelling reason for them
14 to come to Atlanta to participate in the 2021 WSC because the
15 All Star Game was no longer taking place.

16 THE COURT: What affidavit, again?

17 MR. KLEINHENDLER: This is the Florence affidavit,
18 declaration, Paragraph 11.

19 THE COURT: But that has the same problem. I don't
20 know if that's what Mr. Florence thinks, that that's his
21 opinion, that they weren't coming because the All Star Game
22 wasn't there anymore or whether someone told him that. The
23 affidavit is silent.

24 MR. KLEINHENDLER: Your Honor, we could correct that.
25 The reason is, that's what they told him.

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1 THE COURT: Do you know that in fact or are you just
2 making it up?

3 MR. KLEINHENDLER: No, I spoke to him, we spoke.

4 THE COURT: Who told him that? You don't know?

5 MR. KLEINHENDLER: I can't give you that detail. But
6 the point is, there was a promise made to all of these --

7 THE COURT: Individually? Like there was one to every
8 single business that --

9 MR. KLEINHENDLER: No, there was one promise made and
10 everybody relied on that promise. And then they canceled it.

11 THE COURT: I got that.

12 MR. KLEINHENDLER: And there's a way to fix it.

13 THE COURT: Well, according to your client, the way to
14 fix it is a \$100 million pool of money to recompense the
15 businesses.

16 MR. KLEINHENDLER: That's if the game can't come back.

17 THE COURT: But that means money damages are adequate?

18 MR. KLEINHENDLER: No.

19 THE COURT: Well, why not?

20 MR. KLEINHENDLER: Because --

21 THE COURT: Your client said, the CEO of the plaintiff
22 said he doesn't care if the game comes back. The option of
23 \$100 million is just ducky.

24 MR. KLEINHENDLER: Your Honor, I think the main point
25 there is that we want the game back. Because by bringing the

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1 game back, we no longer have to make any assumptions about what
2 the damages are. If you bring the game back, everybody is made
3 whole. Whereas, if you don't bring the game back, then okay,
4 this is what the chamber of commerce estimated, everybody has
5 to come in and put their damage claims in.

6 THE COURT: Yes, you have to prove damages.

7 MR. KLEINHENDLER: Okay. But we have a much easier
8 solution, bring the game back.

9 THE COURT: Do you agree that because this would be a
10 mandatory injunction, you have to hit the higher standard?

11 MR. KLEINHENDLER: No.

12 THE COURT: Why not?

13 MR. KLEINHENDLER: And we briefed that.

14 THE COURT: But you ignored one of the two legs of
15 that standard. That standard has two legs. It's either if
16 you're changing the status quo or if you are providing the
17 plaintiff with substantially all of the remedy that they want
18 and that it can't be reversed if the defendant wins.

19 MR. KLEINHENDLER: Your Honor, we're citing *Asa v.*
20 *Pictometry Intern.* When a party tramples on someone else's
21 rights, bringing back to the status quo before that is not a
22 mandatory injunction. It's called a prohibitory injunction.

23 THE COURT: But none of the cases that you cited
24 involve circumstances where you're providing the plaintiff with
25 all of the remedy that they want and you can't undo it. So

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1 some of your cases were, for instance, children who get
2 suspended from school, so they get reinstated to school. But
3 if the defendant ultimately wins, they serve their suspension
4 later; right? I mean, those cases are just different.

5 MR. KLEINHENDLER: Well, even if you do have the
6 higher standard, all you need to show on the higher standard is
7 a likelihood of success on the merits instead of a reasonable
8 chance of succeeding on the merits. We think we have shown
9 that.

10 THE COURT: No. You is to show clear or substantial
11 likelihood of success on the merits.

12 MR. KLEINHENDLER: Substantial likelihood of success
13 on the merits. And I just get back to it, your Honor. If they
14 are a public actor -- let's just get back to that for a
15 second -- if they're a public actor and they decided to treat
16 Georgia differently than Colorado, they violated the privilege
17 and immunities clause, black and white. And this isn't about
18 what their intention was. It's irrelevant. They could have
19 had the best intentions in the world. It doesn't matter.
20 Because their reason is not a valid reason.

21 THE COURT: According to you? Do you just think that
22 reasonable minds can't differ on whether a law is net positive
23 or net negative? That's just not subject to dispute?

24 MR. KLEINHENDLER: No. I don't say that. What I'm
25 saying is, you cannot pass judgment on a state's invocation of

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1 its independent right to pass voting laws when the basis of
2 your negative view is, well, I don't like the fact that they
3 have a voter ID, when voter ID has been held by the Supreme
4 Court to be legal.

5 THE COURT: You're picking at one piece of the law.

6 MR. KLEINHENDLER: That was the reason. We don't like
7 voter ID and you can't give water to people waiting on line.
8 That's not true.

9 THE COURT: You keep wanting to argue the merits.
10 This case is not about whether the Georgia law is a good law or
11 a bad law. You think it's a good law, fine. That's not what
12 this case is about.

13 MR. KLEINHENDLER: What this case is about, Judge --

14 THE COURT: Let me just say, under your theory, let's
15 say Planned Parenthood had announced two years in advance that
16 it was going to have a convention in the State of Georgia, and
17 then three weeks or three months before the convention was to
18 appear, Georgia passes a law that says abortion is illegal
19 entirely in the State of Georgia and in fact, contraception is
20 illegal, you're saying Planned Parenthood still has to go have
21 their convention, spend millions of dollars in Georgia because
22 the Georgia legislature passed a law that they think is the
23 right law? And maybe even three quarters of the Georgians
24 think it's a good law, you're saying that organization still
25 has to have its convention in that state.

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1 MR. KLEINHENDLER: No, no.

2 THE COURT: Okay. So that's different?

3 MR. KLEINHENDLER: Yes.

4 THE COURT: They can move their convention to Colorado
5 and that would be okay?

6 MR. KLEINHENDLER: That would not be a constitutional
7 violation, because they would have a legitimate reason.
8 Because they're in the abortion business, and the state has
9 basically put them out of the abortion business. That would be
10 a valid reason. You can discriminate between one person in one
11 state and one person in another state, your Honor, if you have
12 a valid reason. The situation you just gave is a valid reason.
13 The reason they gave is not a valid reason. We don't like your
14 voting law because it has voter ID and you can't give water to
15 people on line.

16 THE COURT: Let's say it's not a ban on abortion, it's
17 a requirement that you have to provide certain ID, that you
18 have to have your parents come in and sign off on the abortion
19 and some other requirement, it's a restrictive abortion law.

20 MR. KLEINHENDLER: And this is Planned Parenthood as a
21 public actor, we're saying?

22 THE COURT: You seem to think everybody is a public
23 actor.

24 MR. KLEINHENDLER: No. I'm saying that Major League
25 Baseball that gets billions of dollars and that has states

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1 intertwined with how every single stadium operates and they
2 have to collect taxes for the state and they have to get
3 security from the state -- when I say the state, I mean local
4 municipal governments -- and they get a federal antitrust
5 immunity, yeah, that's a state actor. Not a private
6 organization that just is Planned Parenthood. That's not the
7 same.

8 THE COURT: But I thought your hindrance argument,
9 that's under your 1985(3) theory, is not --

10 MR. KLEINHENDLER: On the hindrance --

11 THE COURT: This is all the hindrance argument.
12 There's no equal protection here. You still don't have a
13 group.

14 MR. KLEINHENDLER: The hindrance argument is you are
15 preventing the state from treating its residents with equal
16 protection. In your abortion case, by you pulling -- you're
17 pulling your convention from the state, I don't believe you're
18 hindering -- I don't believe under that -- let me put it this
19 way. It has to do with scope. It has to do with scope and it
20 has to do with impact. You're right, not everything would be
21 considered a violation, even if it looks like a violation. It
22 has to do with scope.

23 Taking the Major League All Star Game, which is a
24 national event, away from a state based on a public
25 announcement that your state's laws are racist or restrictive

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1 or prohibitive, okay, is a tremendous matter in terms of scope.

2 THE COURT: I don't understand that at all, nor do I
3 see any indications that you cite say anything about this being
4 a scope issue. I don't even know what that means.

5 MR. KLEINHENDLER: What it means is if there were ten
6 people blocking entrance to a ballpark, you could technically
7 argue that they were committing a hindrance of my -- sorry, a
8 polling place. There were ten people blocking entrance to a
9 polling place. You could conceivably argue that they were
10 basically preventing voters from carrying out their right to
11 vote. But since there are only ten people blocking one voting
12 place, we wouldn't be arguing constitutional violations.

13 THE COURT: I don't think you're right. I think if
14 there were ten uniformed clansmen blocking a black polling
15 place, you would get a lawsuit under the KKK act and the
16 plaintiffs would win and they'd get an injunction.

17 MR. KLEINHENDLER: If they were blocking the
18 minorities there, that's equal -- yes. But what I'm saying on
19 the hindrance part --

20 THE COURT: If they were hindering anybody who wanted
21 to get into the polling place.

22 MR. KLEINHENDLER: That's something else. That's a
23 different part of the statute. The point I'm trying to make
24 here is, hindering a state from allowing -- that's what the
25 language is -- hindering a state from providing equal

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1 protection to its people, and that's what Major League
2 Baseball, we argue, has done here.

3 THE COURT: I just don't get how any of this has to do
4 with hindering Georgia from providing equal protection to its
5 citizens. I don't understand it. It's not encouraging Georgia
6 to discriminate against blacks or whites or poor people or rich
7 people or women or men or Hispanics or Asians. Where is the
8 equal protection violation?

9 MR. KLEINHENDLER: The equal protection violation
10 here, your Honor, is you are denying people in Georgia the
11 right to have an All Star Game.

12 THE COURT: What you just said -- I wish I had
13 LiveNote up, but what you just said was that the problem with
14 hindrance was they're hindering Georgia's ability to provide
15 their citizens equal protection under the law.

16 MR. KLEINHENDLER: Correct.

17 THE COURT: No one in Georgia is a host to the All
18 Star Game; not black people, not white people, not men, not
19 women, not tall people, not short people. I'm struggling to
20 understand your equal protection theory.

21 I'll tell you what, I've let you go on for a while.
22 Let me hear from baseball and the union, and then we'll come
23 back to you.

24 MR. HARDIMAN: Your Honor, John Hardiman for baseball.
25 I don't have much to say because, frankly, you hit most of my

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1 points, even the First Amendment, which was going to be my
2 surprise today.

3 THE COURT: Sorry I took your thunder.

4 MR. HARDIMAN: I understand. It happens all the time.

5 Obviously, we feel very strongly about the claims on
6 the merits. We don't think these allegations will even get
7 past a motion to dismiss, much less the much higher standard
8 they would have to meet for a preliminary injunction and also
9 the irreparable injury claims. Maybe the easiest way, the
10 simplest way to make a quick argument would be to look at
11 Mr. Florence. I mean, he made a business decision that this
12 year he might make more money if he had his fast pitch
13 tournament near the All Star Game, and he's been frustrated in
14 that. That frustration does not amount to an equal protection
15 violation, a hindrance clause, a dormant clause or a privilege
16 and immunities action. It's not tortious interference because
17 it has to have been done intentionally to him. It's not
18 tortious interference with business relations because it had to
19 be done maliciously to him. It is not promissory estoppel
20 because there was no promise made directly to him. And on that
21 point, your Honor, on promissory estoppel, plaintiffs do allege
22 a claim in their complaint on promissory estoppel, but in their
23 preliminary injunction papers, they do not make any argument
24 that promissory estoppel satisfies the standards for a
25 preliminary injunction. They have it in a heading, but it's

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1 all treated under unjust enrichment, which by the way is not
2 alleged in the complaint.

3 The only other thing I would say, your Honor, because
4 this sort of goes to what you -- and also, by the way, on
5 Mr. Florence, we could pay him money to satisfy his damages.

6 You started by talking about what was the mission of
7 JCN, and they were talking about their additional funding that
8 they may have to make. I wanted to point you to something else
9 in Mr. Ortiz's affidavit, which is what he said their future
10 expenses will be, they will continue a national education
11 campaign to dispel political activist lies about the Georgia
12 voting law. So what he's apparently going to do is still fight
13 about the voting law. And the controversy about that is not
14 going to end no matter where the All Star Game is.

15 Your Honor, that's all I have, unless you have some
16 questions for me.

17 THE COURT: I don't think so.

18 MR. HARDIMAN: Thank you.

19 THE COURT: I have one question, sorry. I'm sure it's
20 in your papers, but what was the articulated basis for Major
21 League Baseball moving the game?

22 MR. HARDIMAN: I'll read you the reports. "I have
23 decided that "-- this is the commissioner, there's a press
24 release we cited in the second and third page of our brief --
25 "I have decided that the best way to demonstrate our values as

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1 a sport is by relocating this year's game and Major League
2 Baseball draft. Major League Baseball fundamentally supports
3 voting rights for all Americans and opposes restrictions to the
4 ballot box." It then goes on and talks about some other things
5 it's done to support those. So that's the reasons.

6 So since you asked me the question, I get to make my
7 point, I think the only constitutional issue here is if you
8 were to enjoin baseball, give the injunction plaintiffs want
9 for taking that position, I do think that raises a First
10 Amendment issue. That's all I've got.

11 THE COURT: What about the union?

12 MR. KESSLER: Your Honor, I'm going to be very short.
13 My client rarely agrees with Major League Baseball, on this
14 we're in agreement. My point, your Honor, we don't belong
15 here. You've listened to this argument for an hour. Did you
16 hear the union mentioned even once?

17 THE COURT: I think you are a conspirator. I think
18 you are only in the 1985(3) claim as a conspirator.

19 MR. KESSLER: Well, I'm listed in all these other
20 claims as well. I'm listed in the state tort claims. I'm
21 listed in -- but you're right I'm only one of the two 1985
22 claims, only the 1985 claim on the KKK act.

23 The point here, your Honor, is that they admit that we
24 don't have the power. We didn't make the decision. It's right
25 in their papers. They never directed anything at us. And they

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1 do have a duty on an injunction to have evidence. And if
2 they're going to say we're in a conspiracy, they have to show
3 an agreement. There are no facts of an agreement alleged here.

4 They allege four pieces of evidence. This is all they
5 allege here -- not all evidence, but I'll give them the benefit
6 of the doubt -- one, they cite a public statement by Mr. Clark
7 that he has not yet spoken to Major League Baseball, the
8 opposite of an agreement.

9 Number two, they cite the public statement of Major
10 League Baseball announcing they have canceled the game, which
11 simply says they have consulted with many people; retired
12 players, constituencies, the union, they have listened to
13 everyone's views and said they made the decision. It actually
14 says, I made the decision, the commissioner. Nothing about any
15 agreement.

16 Then they cite a news article that says they heard
17 unidentified players -- not the union, not Mr. Clark --
18 unidentified players were threatening to boycott the game, has
19 nothing to do with the union. And the same article, the same
20 article says the decision was made by Major League Baseball on
21 its own entirely.

22 The last piece of so-called evidence they have is they
23 say that the chairwoman of Cobb County made a public plea to
24 please give back the game, and the union didn't do anything.
25 Well, the union doesn't have any power to do anything, as they

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1 said. And they actually say in their brief -- this is their
2 reply brief, Page 8 -- they agree, "The MLBPA lacks the power
3 to return the game to Atlanta." So what was my client supposed
4 to do?

5 Your Honor, this is a fatal defect to every claim.
6 And particularly under the heightened standard. I want to add,
7 your Honor, they actually fail both prongs. Your Honor is
8 right, they fail the complete relief that can't be fixed
9 unquestionably. The reason they fail mandatory injunction is
10 because they sat on their rights for two months. And what the
11 case law says is when you sit on your rights, a new status quo
12 happens. The new status quo is the game is in Denver.
13 Everyone is relying on that; people in Denver are relying on
14 it, businesses, stadiums, that's the status quo. So this is
15 still a mandatory injunction.

16 The last point I have, your Honor, is that they do say
17 intent is relevant and they publicly besmirch my client saying
18 we have a racist intent. And the reason they said that is
19 because the KKK act requires that you have an invidious racist
20 intent as part of the conspiracy. That's wrong. There's no
21 possible basis for it. And I'm making this point now your
22 Honor, because it's not only to defend my client, but we think
23 this is a sanctionable abuse of process to just say that when
24 we have nothing to do with the decision and certainly we're a
25 union who is dedicated to our diverse membership. To make that

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1 claim, it's wrong. And we may be back to your Honor on that
2 subject on a later day.

3 Finally, Mr. Clark, they made no allegation that's
4 separate from him being the executive director. He doesn't
5 belong here either. That's it for me, your Honor, unless you
6 have something else.

7 THE COURT: That's fine. Was he sued as an
8 individual? I guess he was.

9 Mr. Kleinhendler?

10 MR. KLEINHENDLER: Your Honor, I'd like to get back to
11 some of your questions.

12 THE COURT: Okay.

13 MR. KLEINHENDLER: With regard to the deprivation
14 clause, we didn't talk about that. So the 1985(3) has two
15 prongs; the hindrance clause and the deprivation clause. And
16 on the deprivation clause, we cite *Metro Life Insurance* -- you
17 asked me for some of my better cases -- it's a 1985 Supreme
18 Court case. What Major League Baseball did here is they are
19 punishing Georgia residents and businesses with the aim of
20 forcing Georgia to change the law. Now, I know your point is,
21 well, do we have evidence that Georgia will in fact change the
22 law? I understand that. But I argue to you that the mere --
23 threatened and harassment is in itself a violation of the
24 deprivation clause.

25 THE COURT: Where is this in your brief?

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1 MR. KLEINHENDLER: Page 11, your Honor. It's on Page
2 11 of the moving brief.

3 THE COURT: Go ahead.

4 MR. KLEINHENDLER: Second, your Honor, you asked me
5 what was the equal protection violation here. And the equal
6 protection violation, your Honor, is even though it's a large
7 class, it's preventing the people of Atlanta from enjoying
8 economic benefits merely because their state has enacted a
9 certain law that is anathema to the person that has deprived
10 them of the economic benefits. And what happens, your Honor,
11 is if we don't have a valid integrity law, that impact to equal
12 protection rights of every citizen who votes and that was what
13 I was --

14 THE COURT: How?

15 MR. KLEINHENDLER: Because it basically turns into,
16 your Honor, a preclearance statute. And the Supreme Court
17 showed --

18 THE COURT: Wait a minute. Say that again.

19 MR. KLEINHENDLER: The court in *Shelby* -- which is a
20 Supreme Court case --

21 THE COURT: Yes.

22 MR. KLEINHENDLER: -- said that Congress cannot force,
23 Congress cannot force a state to --

24 THE COURT: To preclear their election laws.

25 MR. KLEINHENDLER: Preclear their election. What

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1 major League Baseball -- if they are a state actor -- what they
2 are doing here is, unless we like your election law, we're
3 going to hurt you by taking away economic benefits that we have
4 promised to you, okay. We're going to hurt you by taking that
5 away from you. And that makes this unique to the voting law
6 issue here and somehow distinguishes some of the other examples
7 you were giving --

8 THE COURT: That's nowhere in your briefs.

9 MR. KLEINHENDLER: Sure it is. We cite *Shelby*.

10 THE COURT: No.

11 MR. KLEINHENDLER: It is sure.

12 THE COURT: That you are arguing that Major League
13 Baseball has essentially stepped into the role of the
14 Department of Justice and is imposing preclearance on Georgia
15 legislature?

16 MR. KLEINHENDLER: Yes, your Honor. Sure.

17 THE COURT: Well, I certainly did not understand that
18 to be your argument.

19 MR. KLEINHENDLER: Your Honor, Page 12 of the brief,
20 I'll read it to you. "For defendants to punish Georgia for
21 taking these reasonable measures, measures with Georgia's
22 sovereign right in our federal system, is to claim for
23 themselves the right to preclear Georgia's election law in a
24 way that Supreme Court has held to violate equal protection
25 principles when Congress itself takes that action." *Shelby*,

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1 Page 12 of our moving brief.

2 With regard to the comments from Mr. Clark --

3 THE COURT: From Mr. Clark?

4 MR. KLEINHENDLER: I'm sorry, counsel for Mr. Clark.

5 The reason the union and Mr. Clark have been sued is because
6 it's clear that Mr. Manfred and Mr. Clark communicated about
7 moving the game out of Atlanta. It's clear and we have other
8 basis for that that's not simply in the public statements.

9 THE COURT: But just communicating isn't an agreement.

10 MR. KLEINHENDLER: Well, no, we are saying they
11 communicated and agreed, we have evidence -- we have very, very
12 good reason to allege that they were in communications with
13 others together on telephone calls -- Clark and Manfred and
14 others -- and together they decided that we're going to react
15 to the voting law by moving the All Star Game. Mr. Clark
16 himself participated.

17 THE COURT: Where is that in the complaint?

18 MR. KLEINHENDLER: Your Honor, we say in the complaint
19 that they met and spoke and agreed. At this stage --

20 THE COURT: I think you say met and spoke, but maybe
21 you said agreed. It was thin on facts.

22 MR. KLEINHENDLER: Well, your Honor, on conspiracy,
23 you don't usually have all the facts.

24 THE COURT: But you need to have some.

25 MR. KLEINHENDLER: Yes.

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1 THE COURT: You might not have all of them, but you
2 need some.

3 MR. KLEINHENDLER: The facts are borne out by -- the
4 public statements certainly give an inference to the fact.
5 These aren't facts coming out of nowhere. They're even
6 corroborated by the public statements of some of the parties.

7 THE COURT: You're talking in broad generalities.
8 Look, you are the plaintiff. You have to have a well pled
9 complaint that has facts. They may not have all the facts, but
10 they have to have some facts.

11 MR. KLEINHENDLER: The facts, your Honor, are in the
12 complaint.

13 THE COURT: That's what I was asking you. Where is
14 your allegation about Mr. Clark?

15 Paragraph 32 says "players are aware of the Georgia
16 law and we have not talked to Major League Baseball, but we
17 would like to talk too Major League Baseball."

18 MR. KLEINHENDLER: Paragraph 34, your Honor, "Between
19 March 26th and April 1st, defendants Manfred and Clark
20 discussed the Georgia act and the plan to punish Atlanta-based
21 businesses, including JCN's members by moving the All Star
22 Game."

23 THE COURT: It doesn't say there's an agreement.

24 MR. KLEINHENDLER: Keep going. "On Friday, after
25 agreement was reached among defendants --"

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1 THE COURT: But you don't say that Mr. Clark was part
2 of that.

3 MR. KLEINHENDLER: There are no other --

4 THE COURT: The general allegation.

5 MR. KLEINHENDLER: There are no other defendants.
6 There are only two. There's Manfred and Clark.

7 THE COURT: How about Major League Baseball and the
8 union?

9 MR. KLEINHENDLER: Major League Baseball functions
10 through Mr. Manfred, so he's acting on their behalf. We're not
11 alleging separate conspiracies.

12 THE COURT: For that allegation, it could be the
13 agreement between Manfred and baseball, between Manfred and the
14 other team owners. It's very unclear. Look, your complaint is
15 not well pled in this regard. I think that's Mr. Kessler's
16 only point.

17 MR. KLEINHENDLER: With regard to -- he's saying he
18 has no basis upon which to participate in the decision to move
19 the game, I would refer you to the Major League Baseball
20 constitution and Article 3, Section 6F says specifically that
21 mandatory All Star Game participation, "All clubs have to
22 provide the necessary services of players." So within the
23 baseball's constitution, there is an obligation on the players
24 who are represented by the union to participate in the All Star
25 Game where it is played.

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1 THE COURT: Right, to show up and play.

2 MR. KLEINHENDLER: That's why we included them in the
3 injunction.

4 THE COURT: You named them as a defendant. I think
5 Mr. Kessler's point is, you named them as a defendant. You
6 didn't just say they're along for the ride.

7 MR. KLEINHENDLER: We named them as a defendant
8 because they were in the conspiracy.

9 THE COURT: And his point is you don't have well pled
10 allegations showing that they agreed to anything.

11 MR. KLEINHENDLER: That's his position, okay. But
12 there's a reason why we included them. If I needed to amend
13 that, I could be more specific. But there's a reason they're
14 included. And they're necessary for the injunction, your
15 Honor, because they have to cooperate. So if you ordered Major
16 League Baseball move the game back to Atlanta, they have to
17 cooperate with that and say, okay, we're going to play.

18 THE COURT: Well, they're obligated under --

19 MR. KLEINHENDLER: But that's why they are a necessary
20 party here because we need them to agree to play in the game
21 and not say, well, you know something, Major League Baseball,
22 you may want to bring the game back, but we're not going to
23 play. And so that's the reason we named them. There was a
24 reason to name them. It wasn't for nothing. So his points are
25 just simply incorrect, that he has nothing to do with it. It's

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1 just not correct.

2 So the point here, your Honor, is at the end of the
3 day, I think the perception you have of Major League Baseball
4 being allowed to have a First Amendment right or being allowed
5 to have some type of opinion on a statute, okay, is not
6 consistent with the congressional requirements that to impose a
7 harm -- to impose a harm, which is pulling the All Star Game,
8 which is a harm, okay -- maybe we haven't quired it correctly,
9 maybe we haven't identified every single person that is harmed,
10 but it is a harm, and at least one person has demonstrated his
11 harm. If you are going to harm someone, you need to have a
12 valid reason. And if your reason for harming them is because
13 you have a problem with the voting laws of a certain state, you
14 call into question the various statutes that we have identified
15 to you. Because by doing that, you are effectively punishing
16 the state for enacting a law of election integrity and that in
17 turn affects how the people in the state can vote, which is an
18 equal protection issue.

19 So getting back to where is the equal protection
20 violation? That's where the equal protection -- the right to
21 have your vote counted properly and effectively, because the
22 laws in your state guarantee election security, that's your
23 equal protection.

24 Where is your privilege of immunities? That's the
25 simple theater analogy. You, Major League Baseball, you cannot

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1 treat Atlanta or Georgia -- you can't treat people different
2 from different states differently. You just can't do that. So
3 you can't say yes to Colorado, no to Georgia because we don't
4 like your voting law. It's not a legitimate reason. Now, you
5 may think -- you may disagree with me on that. I get it. But
6 if you agree that it's not a legitimate reason because Georgia
7 has its own right to make its laws and saying that I don't like
8 the law because voter ID inhibits people from voting, that's
9 not a valid reason, because the Supreme Court said it's fine.
10 And by the way --

11 THE COURT: No, the Supreme Court says it's not
12 unconstitutional. The Supreme Court doesn't sate it's good
13 policy. There's a difference between something being
14 permissible as a matter of constitutional or statutory law and
15 it being good policy. And a lot of what goes on in the
16 marketplace of ideas and in arguments and people taking stands
17 is not that they're saying what you're going to do is unlawful.
18 It is to say, you may be able to do that, but we think that's
19 bad policy. We think that restricts the franchise. We think
20 that impinges on a woman's ability to choose what she's going
21 to do with her own body, whatever it is that people are arguing
22 about. The fact that what they did was legal and may pass
23 constitutional muster if it's challenged in the State of
24 Georgia is an entirely different question than whether
25 businesses can say, we don't like this, we think this is not

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1 the right -- from a policy perspective -- we don't think this
2 is the right way to go. We don't want to participate in this.
3 We don't want to spend the entire All Star weekend having our
4 players, our manages, our owners being asked, why are you
5 playing this game in Georgia when they just passed this law
6 that has all of these alleged negative effects. Maybe it does,
7 maybe it doesn't. But that's a policy debate that maybe Major
8 League Baseball just doesn't want to have. It just wants to
9 say, look, we don't think this was the right law, so we don't
10 want to be there. We're going to go elsewhere.

11 MR. KLEINHENDLER: If they're a state actor, they
12 don't have that luxury.

13 THE COURT: Assume that you're going to lose that
14 argument.

15 MR. KLEINHENDLER: If they're a private actor, your
16 Honor, if the result of that is to threaten the state
17 legislature because look what's going to happen to you,
18 Mr. State Legislature, when you do something that we, Major
19 League Baseball doesn't like, your Honor, that's a violation of
20 the hindrance clause, because it prevents the state from
21 treating its citizens under equal protection of the law by
22 enacting what it perceives to be safe election policy and laws.

23 THE COURT: I think you agreed with me earlier that a
24 company could announce that if a state takes a certain
25 legislative action that they are not going to move to the

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1 state, that that is permissible. That's something that would
2 hinder and interfere because it takes place before the
3 legislature acts. So they know if they take that action,
4 however good a policy that you think it is, that they may have
5 an adverse impact on their citizenry. I don't think you're
6 right, because I think the company has a First Amendment right
7 to say, we disagree with this and we disagree with it so
8 viscerally, we think it's such bad policy, that if you do that,
9 we are not going to locate our headquarters there. That could
10 easily interfere, particularly if you are a small state.
11 Georgia is not. But if you are a small state, the tax dollars
12 that would be coming in from this particular company would be
13 extremely valuable to the state. It could influence the
14 legislature. But Major League Baseball -- the Georgia
15 legislature has acted. You have not a single allegation that
16 suggests that they are cowed or intimidated by the actions of
17 Major League Baseball. And by the way, they do still have the
18 Braves.

19 MR. KLEINHENDLER: Yes, they do have the Braves, your
20 Honor.

21 But my point to that is I don't need at this point to
22 show you that it's actually going to happen. The threat of
23 intimidation alone is the violation.

24 THE COURT: But you do have to show that there's a
25 substantial likelihood that I'm going to find Major League

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1 Baseball moving a single game somehow has a significant
2 likelihood of intimidating the Georgia legislature that has
3 already acted.

4 MR. KLEINHENDLER: Your Honor, what you have to
5 find -- let's just get it really sharp -- if you find a
6 constitutional violation, you have assumed irreparable injury.
7 If you have a likelihood of success on a constitutional
8 violation, you have assumed irreparable injury, I have met the
9 standards --

10 THE COURT: If I assume everything that you argue, of
11 course you win.

12 MR. KLEINHENDLER: I'm not saying you should assume
13 anything. I'm saying that all you need to find as a matter of
14 law because the facts are not in dispute -- really not in
15 dispute -- all you need to find as a matter of law is that the
16 threat to the Georgia legislature, which was carried out
17 through a punitive action, is in itself a violation of the
18 hindrance clause and 1985(3).

19 Now, I don't believe you need to reach the conclusion
20 or need to have an overwhelming likelihood of success that
21 Georgia legislature will in fact act based on this
22 intimidation. All we need to show is that there was an
23 intimidation, the intimidation was based on duly elected voting
24 law, and that the purpose of it was to punish Georgia,
25 punish --

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1 THE COURT: Who was intimidated? You just said all
2 you have to do is show intimidation. So who was intimidated?

3 MR. KLEINHENDLER: The people of Georgia were
4 intimidated because --

5 THE COURT: How so?

6 MR. KLEINHENDLER: Because they lost -- they were
7 publicly --

8 THE COURT: That's circular. How were they
9 intimidated?

10 MR. KLEINHENDLER: They were punished.

11 THE COURT: That's not intimidation.

12 MR. KLEINHENDLER: Yes, it is. I'm punishing you --

13 THE COURT: You laid out the standard. You said, I
14 have to show intimidation. You have to show intimidation?

15 MR. KLEINHENDLER: Yup.

16 THE COURT: Right. So who was intimidated? All of
17 the people of Georgia were intimidated, you're saying? People
18 who favored the law, people who disfavored the law, people were
19 agnostic to the law?

20 MR. KLEINHENDLER: No. They were intimidating the
21 Georgia legislature by taking this punitive action based on
22 conduct that the Georgia legislature enacted.

23 THE COURT: Anything further?

24 MR. KLEINHENDLER: No, your Honor.

25 THE COURT: Last chance for baseball. Last chance for

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1 the union.

2 MR. KESSLER: Just one thing, your Honor. Not only
3 does he not plead an agreement -- and we'll do that on the
4 motion to dismiss -- but since it's a preliminary injunction
5 and he has to have evidence, there's no evidence. That's it,
6 your Honor, for me.

7 THE COURT: Let's take a five-minute break.

8 (Recess)

9 THE COURT: I am prepared to rule on plaintiff's
10 motion for preliminary injunction.

11 The motion is denied. The plaintiff lacks standing to
12 seek injunctive relief and has failed to demonstrate that it is
13 likely to suffer irreparable harm in the absence of an
14 injunction.

15 Before the Court can even reach the merits of
16 plaintiff's motion for preliminary injunction, it must be
17 satisfied that the plaintiff has standing, *City of Los Angeles*
18 *v. Lyons*, 461 US 95, 101 (1983), "Those who seek to invoke the
19 jurisdiction of the federal courts must satisfy the threshold
20 requirement imposed by Article III of the constitution when
21 alleging an actual case or controversy." To satisfy Article
22 III's standing requirements, the plaintiff must show that it
23 has suffered an "injury in fact" that is not only concrete and
24 particularized but actual and imminent, rather than conjectural
25 or hypothetical, *Lujan v. Defenders of Wildlife*, 504 US 555,

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1 560 to 61 (1992). The plaintiff must also show that the injury
2 is fairly traceable to the challenged action of the defendant
3 and that it is likely, as opposed to merely speculative, that
4 the injury will be redressed by a favorable decision, *Id.*

5 An organization may establish standing on behalf of
6 itself by demonstrating these same three requirements; injury
7 in fact, traceability and redressability, *New York Civil*
8 *Liberties Union v. New York Transit Authority*, 684 F.3d 286,
9 294, Second Circuit 2012. Alternatively, an organization may
10 demonstrate a standing on behalf of its members by
11 demonstrating that: One, its members would have standing to
12 sue in their own right; two, the interest it seeks to protect
13 are germane to the organization's purpose; and three, neither
14 the claim asserted nor the relief requested requires the
15 participation of individual members in the lawsuit, *Hunt v.*
16 *Washington State Apple Advertising Commission*, 432 US 333, 343
17 (1977).

18 A plaintiff must demonstrate standing for each claim
19 and for each form of relief sought, *Cacchillo v. Insmmed, Inc.*,
20 638 F.3d 401, 404, Second Circuit 2011. To have standing to
21 seek injunctive relief, the plaintiff must establish that it
22 has sustained or is immediately in danger of sustaining some
23 direct injury as a result of the defendant's challenged
24 conduct, *Lyons* 461 US at 102. The plaintiff cannot rely on
25 past injury to satisfy the injury requirement when seeking an

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1 injunction, but must instead show a likelihood that it will be
2 injured in the future, Id.

3 Here, plaintiff fails to allege any prospective
4 ongoing injury to JCN itself. Although it's very unclear from
5 the complaint exactly what the mission of JCN is, it appears
6 that its mission is to educate policymakers about policies that
7 help or harm small businesses, complaint Paragraph 10.
8 Specifically, the complaint alleges that, "When JCN members
9 suffer injury due to bad public policy," JCN "amplifies their
10 stories in the media to educate policymakers and the public
11 about the significant consequences of bad public policy in an
12 attempt to rectify it," Id. Nowhere does the complaint allege
13 how Major League Baseball's decision to move the All Star Game
14 had or will have any direct impact on its ability to continue
15 to communicate the importance of small businesses to the US
16 economy or to amplify the impact that bad public policy has on
17 small businesses.

18 JCN asserts that Major League Baseball's decision to
19 move the All Star Game has "caused direct damage to JCN"
20 because since the cancellation announcement on April 2, 2021,
21 it has diverted resources and incurred expenses to protest
22 MLB's decision, such as leasing a sign in Times Square and
23 taking out an advertisement in the "New York Times," complaint
24 Paragraph 13. Although it is true that diversion of an
25 organization's resources to respond to a defendant's alleged

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1 wrongdoing can constitute an injury in fact, for it to do so,
2 the organization must divert resources from its general mission
3 or typical activities, *Havens Realty Corp. v. Coleman*, 455 US
4 363, 379 (1982), holding that plaintiff had alleged a
5 cognizable injury because defendants' racial steering practices
6 "impaired its efforts to equal access to housing through
7 counseling and referral services," and caused plaintiff to have
8 to "devote significant resources to identify and counteract"
9 the practices, *Olsen v. Stark Homes, Inc.*, 459 F.3d 140, 158,
10 Second Circuit 2014. Entity had organizational standing due to
11 its diversion of resources from its housing advocacy and
12 counseling services in order to investigate alleged
13 discriminatory practices, *Center for Food Safety v. Price*, No.
14 17 CV 3833, 2018 WL 4356730 at Page 5, (S.D.N.Y. September 12,
15 2018), holding that injuries that are "not sufficiently
16 distinct from the general mission of the organization" are
17 insufficient to confer standing.

18 In this case, the Court is not at all convinced that
19 plaintiff has in fact diverted resources to respond to
20 defendant's decision to relocate the game. In fact, it appears
21 that taking out advertisements in newspapers and posting
22 billboards is precisely how plaintiff fulfills its mission.
23 For example, plaintiff's website indicates that on May 26th,
24 2021, plaintiff placed a billboard in Times Square that stated,
25 "Zero Stars for New York's Union Boss Power Grab. Find out why

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1 everyone hates New York's plan to force gig workers into
2 Unions." On March 22, 2021, plaintiff placed a billboard in
3 Times Square that stated, "Biden wants to raise taxes on small
4 businesses? Hell no! Not on our watch!" A quick perusal of
5 the advertisements page of JCN's website shows that it has paid
6 for 17 billboards and ads since January 2020. Put differently,
7 plaintiff has failed to allege that its purported injuries --
8 which include buying an ad in the "New York Times" and posting
9 a billboard in Times Square -- are "sufficiently distinct" from
10 its overall mission to constitute an injury in fact, *Center for*
11 *Food Safety* at Page 5.

12 That being said, to the extent that plaintiff argues
13 it has suffered an injury in fact, because allocating resources
14 to protest MLB's decision is sufficiently distinct from its
15 overall organizational mission, such expenditures do not
16 constitute a cognizable injury. It is well settled law that an
17 entity's "mere interest in a problem" absent any allegation of
18 actual injury is insufficient to confer standing, *Sierra Club*
19 *v. Morton*, 405 US 727, 739 (1972). The court does not doubt
20 that JCN has an intense interest in where the All Star Game is
21 played. Although it's not at all clear why it cares more about
22 small businesses in Atlanta than small businesses in Denver.
23 JCN's expenditures that are clearly designed to influence
24 public discourse concerning the wisdom *vel non* of the Georgia
25 election law are simply not the sort of expenses that can be

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1 considered injury in fact for purposes of standing, see *Center*
2 *for Food Safety* at 5, noting that an entity's decision to
3 "spend money on particular interest to it" is insufficient to
4 confer standing because it will "contravene the principle that
5 an entity's mere interest in a problem cannot support
6 standing." The Court is unaware of any case and plaintiff has
7 cited none in which a court has found that an organization has
8 adequately alleged an injury in fact based on its expenditure
9 of resources to complain publicly about the defendant's
10 actions.

11 Finally, and most significantly, putting aside whether
12 expenses associated with complaining about MLB's decision is
13 the sort of injury that is an injury in fact for Article III
14 purposes, past injuries, absent an allegation of their
15 continuing, are insufficient to demonstrate standing to seek
16 injunctive relief, *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220,
17 239, Second Circuit 2016. "Although past injuries may provide
18 standing to seek money damages, they do not confer standing to
19 seek injunctive relief unless the plaintiff can demonstrate
20 that [it] is likely to be harmed again in the future in a
21 similar way." In an apparent attempt to fill the gap that
22 exists in its complaint regarding ongoing injury to itself, JCN
23 has asserted in its reply papers that it intends to spend more
24 than \$10 million over the next six months on a continuing media
25 campaign. That's Ortiz affidavit, Docket No. 38 at Paragraph

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1 5. The goal of the campaign -- according to the plaintiff --
2 is to engage in, "A national education campaign to dispel
3 political activist's lies about the Georgia voting law so
4 additional events, businesses and conventions don't abandon
5 Georgia and Atlanta," Id. First, as noted, those allegations
6 are not in the complaint. Second, also is noted the Court is
7 not convinced that such expenditures are not precisely the type
8 of costs plaintiff assumes in order to fulfill its mission.
9 Third, it is apparent that those expenditures have nothing to
10 do with MLB's decision to relocate the All Star Game. Even if
11 MLB were to move the game back to Atlanta, other businesses
12 that disagree with the policy decisions of the Georgia
13 legislature could continue to shun Georgia, giving rise to
14 JCN's perceived need to "dispel the lies" on which those
15 businesses choose to act. Plaintiff appears to recognize as
16 much because it admits it will continue this campaign for at
17 least the next six months, well beyond the July 13 date of the
18 All Star Game. In short, plaintiff lacks standing to pursue
19 relief on behalf of itself, because it has not adequately
20 alleged injury in fact.

21 Plaintiff has also failed to show that its members
22 have suffered and will continue to suffer concrete injury. At
23 the outset, Plaintiff's complaint fails to identify a single
24 one of its purported 3,600 members from the greater
25 metropolitan Atlanta area, complaint Paragraph 11.

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1 Accordingly, the Court is entirely unable to evaluate whether
2 any actual member of JCN would "have standing to sue in its own
3 right," *Hunt*, 432 US at 343. Plaintiff does not even allege
4 that the purported injuries about which it complains -- things
5 like canceled hotel reservations and changes to restaurant
6 menus that had been planned to honor the All Star Game were
7 suffered by any of its own members, as opposed to having been
8 suffered by random small businesses that have no connection to
9 JCN. For example, plaintiff alleges that, "some" small
10 businesses would "suffer substantial losses if the All Star
11 Game is not immediately reinstated to Truist Park," but it does
12 not specify whether any of those businesses is a member of JCN,
13 complaint Paragraph 12. Similarly, plaintiff alleges that, as
14 a result of the cancellation, "more than 8,000 hotel
15 reservations were canceled" and "revenues from ticket sales and
16 stadium food by the more than 41,000 expected to attend the
17 events at Truist Park were lost," but does not allege that its
18 own members suffered or will suffer any of those injuries. *Id*
19 at Paragraph 41.

20 Moreover, even assuming that the injuries alleged in
21 the complaint were suffered by the members of JCN, plaintiff
22 fails to allege that those injuries were likely to recur, see
23 Paragraphs 41 and 43. Allegations that hotel reservations were
24 canceled, rather than were lost, future events scheduled in
25 Atlanta had already been canceled, and Will Smith "has

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1 canceled" the filming of his movie in Georgia. Put
2 differently, plaintiff's conclusory allegation that the harm to
3 JCN members is ongoing, Ortiz declaration Paragraph 12, is
4 wholly unsupported by any well pled allegations in the
5 complaint. Even the Florence affidavit, which was part of the
6 reply -- not part of the complaint -- alleged injuries in the
7 past, (e.g. he purchased in the past season tickets to the
8 Braves, teams have already dropped out of his event, his
9 opening ceremonies were canceled, his revenue has been
10 reduced.) As noted, plaintiff cannot rely on past injuries to
11 demonstrate standing to seek injunctive relief, *Nacosia*.
12 Accordingly, plaintiff has failed to allege that it has
13 standing to pursue injunctive relief on behalf of its members.

14 Finally, plaintiff fails to establish third-party
15 standing. To establish third-party standing, the plaintiff
16 must demonstrate: One, it has suffered an injury in fact
17 giving it a "sufficiently concrete interest" in the outcome of
18 the issue in dispute; two, it has a "close relation" to the
19 third party; and three, there is "some hindrance to the third
20 party's ability to protect his or her own interests," *Powers v.*
21 *Ohio*, 499 US 400, 411 (1991).

22 Plaintiff alleges injuries on behalf of numerous
23 entities that are not members of JCN including, but not limited
24 to, Cobb County, Cobb County's tourism arm, the City of
25 Atlanta, multiple municipalities, the Atlanta local economy,

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1 "thousands of hardworking ordinary men and women in the Atlanta
2 area," Georgians generally, and "some crew members" on a movie
3 that was being filmed in Georgia until filming was canceled.
4 See, for example, the complaint Paragraphs 1 through 4, 42
5 through 43 and 59. Plaintiff does not even attempt to allege
6 nor could it that it has a "close relation" with any of those
7 purported third parties or that there is any hindrance to their
8 ability to protect their own interest. Accordingly, plaintiff
9 has failed to allege adequately that it has third-party
10 standing to seek injunctive relief.

11 Having found that plaintiff has not alleged any injury
12 on behalf of itself or any ongoing injury to its members and
13 has failed to allege that it has third party standing to sue on
14 behalf of anyone who is not a member of JCN, the Court need not
15 address the causation or redressability prongs of the standing
16 analysis.

17 While some of the failures in the complaint that I
18 have just discussed might be capable of being cared through an
19 amended complaint, even if they were, JCN would not be entitled
20 to a preliminary injunction. The preliminary injunction is an
21 "extraordinary remedy that should not be routinely granted,"
22 *Patton v. Dole*, 806 F.2d 24, 28, Second Circuit 1986. A party
23 seeking a preliminary injunction must show: One, a likelihood
24 of success on the merits; two, that the party is likely to
25 suffer irreparable injury in the absence of an injunction;

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1 three, that the balance of hardships tips in the party's favor;
2 and four, that an injunction is in the public interest,
3 *Capstone Logistics Holdings, Inc. v. Navarrete*, 736 F Appendix
4 25, 26, Second Circuit 2018.

5 Where, as here, the plaintiff seeks a mandatory
6 preliminary injunction that "will provide the movant with
7 substantially all of the relief sought" and that "cannot be
8 undone even if the defendant prevails on the merits," the
9 plaintiff must meet a "higher standard" of clear or substantial
10 likelihood of success on the merits, *Tom Doherty Associates,*
11 *Inc. v. Saban Entertainment, Inc.* 60 F.3d 27, 33 and 35,
12 Second Circuit 1995. Plaintiff argues that it is not subject
13 to this higher standard because it is seeking a return to the
14 status quo before defendants took the action complained of. In
15 so arguing, plaintiff ignores the second factor, which, if
16 present, requires plaintiff to meet the higher standard,
17 specifically whether the requested injunction "will provide the
18 movant with substantially all of the relief sought" and that
19 "cannot be undone, even if the defendant prevails at a trial on
20 the merits." There is no question that requiring MLB to move
21 the game back to Atlanta would provide plaintiff with
22 substantially all of the relief it seeks, and it cannot be
23 undone if plaintiff loses at trial. For that reason, the more
24 rigorous standard applies.

25 "A showing of irreparable harm is the single most

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1 important prerequisite for the issuance of a preliminary
2 injunction," *Faiveley Transportation Malmo AB v. Wabtec Corp.*
3 559 F.3d 110, 118, Second Circuit 2009. Irreparable harm
4 requires a showing that plaintiffs will suffer an "actual and
5 imminent" injury that cannot be remedied if the Court waits
6 until the end of trail to resolve the harm, *Singas Famous Pizza*
7 *Brands Corp. v. New York Advertising, LLC*, 468 F. Appendix 43,
8 45, Second Circuit 2012. In evaluating whether the plaintiff
9 will suffer imminent harm, "the Court must actually consider
10 the injury that plaintiff will suffer if he or she loses on the
11 preliminary injunction, but ultimately prevails on the merits,
12 paying particular attention to whether the remedies available
13 at law, such as monetary damages, are adequate to compensate
14 for that injury," *Salinger v. Colting*, 607 F.3d 68, 80, Second
15 Circuit 2010.

16 Plaintiff has failed to demonstrate that it or its
17 members would suffer irreparable harm absent a preliminary
18 injunction. Although plaintiff equates the loss of the All
19 Star Game to the loss of a child's innocence, Plaintiff's brief
20 at 21, such hyperbole is neither persuasive, nor is it
21 supported by its own arguments. In fact, plaintiff's opening
22 brief concedes that JCN and its members can simply seek money
23 damages if the All Star Game does not return to Atlanta,
24 plaintiff's brief at 2. Moreover, Plaintiff's CEO, Alfredo
25 Ortiz, publicly stated that it was "fine" if MLB did not want

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1 to move the game back to Atlanta, because plaintiff was also
2 giving it the option to instead set up a \$100 million relief
3 fund for the businesses affected by the move, MLB opposition,
4 Docket No. 31 at Page 1, Note 1, citing interview 'They Did
5 Come Together to Punish Georgia': Job Creators Network Sues
6 MLB, DAILY CALLER, (June 1, 2021 at 10:21 p.m.) While the
7 Court seriously doubts that JCN's members in metro Atlanta
8 which it estimates number around 3,600, could have suffered
9 anything close to 100 million in damages by virtue of the
10 relocation of the All Star Game, the concession in the brief
11 that money damages would be adequate to rectify the alleged
12 wrong seriously undermines plaintiff's argument that it or its
13 members will suffer irreparable harm in the absence of an
14 injunction.

15 The Court rejects plaintiff's argument that it has
16 established irreparable harm merely by alleging a
17 constitutional violation, plaintiff's brief at 21. Plaintiff's
18 cited cases all involve allegations of ongoing violations of
19 constitutional rights that could not be remedied by money
20 damages, see for example *Jolly v. Coughlin*, 76 F. 3d at 482,
21 Second Circuit 1996. (Injunction to release inmate from
22 medical keeplock conditions.) *Bery v. City of New York*, 97
23 F.3d 689, 694, Second Circuit 1996, (injunction to lift
24 prohibition on sale of art). *Yang v. Kellner*, 458 F.Supp. 3d
25 199, 209 (S.D.N.Y. 2020) ,injunction to restore candidates'

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1 name to presidential primary ballot and requiring state to hold
2 primary. *National Coalition on Black Civic Participation v.*
3 *Wohl*, 2020 WL 6305325 at Page 10 to 12 (S.D.N.Y. October 28,
4 2020), injunction to stop ongoing voter intimidation. Here, as
5 noted above, plaintiff has not alleged any ongoing injury and
6 has failed to demonstrate that its alleged injury cannot be
7 remedied by money damages.

8 In short, plaintiff has failed to demonstrate that it
9 will suffer an actual and imminent injury that cannot be
10 remedied if the Court waits until the end of trial to resolve
11 plaintiff's claim, *Singas Famous Pizza Brands Corp*, 468 F.
12 Appendix at 45.

13 For those reasons, Plaintiff's motion for preliminary
14 injunction is denied.

15 I would be remiss, however, if I did not point out
16 several other issues with this case. First, this case began on
17 May 31, 2021 with plaintiff filing a motion for an order to
18 show cause on an emergency basis why a preliminary injunction
19 should not be granted. Because the All Star Game was at that
20 point almost exactly six weeks away, plaintiff put this
21 litigation on a fast track for the opponents and for the Court.
22 But this exigency was entirely of plaintiff's own doing. Had
23 this lawsuit been filed in April or even in early May, the
24 parties could have responded on a standard schedule.

25 Second, to say that the legal underpinnings of this

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lawsuit are weak and muddled is an understatement. Plaintiff alleges that defendants were members of a conspiracy to violate JCN's members' constitutional rights to equal protection and to equal privileges and immunities. But I am still at a loss to understand how. Even assuming small business owners are a group that is protected by the equal protection clause -- and plaintiff has cited to no case that so held, and during oral arguments seemed to shift to argue that the class is all of the residents of Georgia -- MLB did not in any way, shape or form single that group out -- that group being small business owners -- for adverse treatment. MLB voted with its feet when the politicians in Georgia made a policy decision with which they strongly disagree. For all this court knows, many of the small business owners in the Atlanta area agree with the MLB that the policy decisions reflected in the new Georgia election law are poor policy choices. But whether small business owners as a group agree or disagree, are deeply divided or are agnostic on that issue, it is hard to see how MLB's decision had an impact on the equal protection rights of small business owners as a group. Indeed, the decision treated large and small, black and white, Latin, Asian, Protestant, Jewish, Muslim, Buddhist and Atheist, male and female, straight, gay and transsexual, democratic and republican business owners exactly the same.

Equally muddled is plaintiff's theory regarding

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1 whether MLB and its union are state actors. It is true that
2 many baseball teams benefit from massive infusions of public
3 dollars into the construction of stadiums. And it is true that
4 baseball has an exemption from the antitrust laws and is known
5 as America's pastime. But those facts individually and in
6 combination just do not convert MLB into a state actor.

7 And of course, during oral argument, plaintiff
8 asserted that MLB's good faith is irrelevant. The hindrance
9 theory requires that the bad actor have a racial or other
10 class-based invidious animosity. Disagreeing with legislation
11 does not equal racial or class-based invidious animus.

12 In sum, the motion for preliminary injunction is
13 denied.

14 On the assumption that plaintiff intends to continue
15 this lawsuit, the Court will schedule an initial pretrial
16 conference for early July. You will get an order setting the
17 date and the required submissions.

18 Anything further from the plaintiff?

19 MR. KLEINHENDLER: Thank you, your Honor.

20 Are you going to enter the transcript in as an order?

21 THE COURT: You are welcome to buy it. I have put it
22 on the record.

23 MR. KLEINHENDLER: Thank you.

24 THE COURT: I'm confident the court reporter would be
25 more than happy to sell it to you. Small business owners, you

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1 know.

2 Anything further from Major League Baseball,
3 Mr. Hardiman?

4 MR. HARDIMAN: Nothing, your Honor. Thank you.

5 THE COURT: Anything from the union?

6 MR. KESSLER: Nothing from us, your Honor. Thank you.

7 THE COURT: Thank you.

8 (Adjourned)